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WASHINGTON TOWNSHIP HEALTH
CARE DISTRICT; WASHINGTON
HOSPITAL HEALTHCARE SYSTEM (a wrongly named party);
WASHINGTON HOSPITAL (a wrongly named party);
WASHINGTON HOSPITAL HEALTHCARE FOUNDATION

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

JANE DOE and JAN DOE, individually and
on behalf of others similarly situated,

Plaintiffs,

v.

WASHINGTON TOWNSHIP HEALTH
CARE DISTRICT; WASHINGTON
HOSPITAL HEALTHCARE SYSTEM;
WASHINGTON HOSPITAL;
WASHINGTON HOSPITAL
HEALTHCARE FOUNDATION; and DOES
1 through 100, inclusive,

Defendants.

Case No.: 3:23-cv-5016

[Alameda County Superior Court
Case No.: 23CV041046]

**DEFENDANTS' NOTICE OF
REMOVAL**

Action Filed: 08/18/2023
Action Removed: 09/29/2023

NOTICE OF REMOVAL

Over the past two decades, the federal government has engaged in an extensive effort to
build a nationwide health information technology infrastructure. This case challenges the
legitimacy of actions WASHINGTON TOWNSHIP HEALTH CARE DISTRICT (the "District");
WASHINGTON HOSPITAL HEALTHCARE SYSTEM ("WHHS", a wrongly named party);

WASHINGTON HOSPITAL (a wrongly named party); and WASHINGTON HOSPITAL HEALTHCARE FOUNDATION (“WHHF”) (collectively, “Washington Healthcare”) have taken in connection with pursuing that directive. Washington Healthcare therefore removes this case pursuant to the federal officer removal statute, 28 U.S.C. § 1442(a)(1).

In like circumstances, as explained *infra* at pp. 12, district courts have allowed removal under the federal officer removal statute. *See Doe I v. UPMC*, No. 2:20-cv-359, 2020 WL 4381675, at *6 (W.D. Pa. July 31, 2020); *see also Doe v. ProMedica Health Sys., Inc.*, No. 3:20-CV-1581, 2020 WL 7705627, at *2-3 (N.D. Ohio Oct. 30, 2020). In support of removal, Washington Healthcare provides the following “short and plain statement of the grounds for removal.” 28 U.S.C. § 1446(a):

NATURE OF THE CASE

1. Washington Township Health Care District is a local Health Care District organized under the laws of the State of California and doing business as Washington Hospital Healthcare System. Therefore, WHHS is a wrongly named party.

2. Washington Hospital Healthcare Foundation is a California nonprofit public benefit corporation with its principal place of business at 2000 Mowry Avenue, Fremont, CA 94538.

3. Washington Hospital is not a legal entity and is merely a business name for the District. Therefore, Washington Hospital is a wrongly named party.

4. On August 18, 2023, Plaintiffs JANE DOE and JAN DOE (“Plaintiffs”) filed a Complaint against Washington Healthcare in the Superior Court of the State of California for the County of Alameda, Case No. 23CV041046.

5. Plaintiffs served Washington Healthcare with the Complaint, on or about September 1, 2023.

6. Plaintiffs’ ten-count Complaint purports to challenge Washington Healthcare’s routine on-line practices as various invasions of privacy, including alleged violations of (1) the California Invasion of Privacy Act, Cal. Penal Code § 631(a); (2) the Confidentiality of Medical Information Act (“CMIA”) (Cal. Civ. Code § 56.101); (3) CMIA (Cal. Civ. Code § 56.10); (4) California’s Constitutional right to privacy; (5) Comprehensive Computer Data Access and Fraud

1 Act (Cal. Penal Code § 502); (6) Quasi-Contract/Restitution/Unjust Enrichment; (7) California’s
2 Unfair Competition Law (Cal. Bus. & Prof. Code §§ 17200, *et seq.*); (8) Cal. Civil Code § 1798.82;
3 (9) Common Law Invasion of Privacy – Intrusion Upon Seclusion; and (10) the Information
4 Practices Act of 1977 (Cal. Civ. Code § 1798.1 *et seq.*). *See generally* Complaint.

5 7. Washington Healthcare operates a website, www.whhs.com that, among other
6 things, provides information to the public about Washington Healthcare and allows patients to
7 access their medical records through a Washington Healthcare patient portal.

8 8. Plaintiff Jane Doe alleges she is a patient of Washington Healthcare and “has used
9 the Washington Healthcare Website and patient portal to search for Washington Healthcare doctors
10 and medical treatment.” Compl. ¶¶ 18-20. Additionally, she alleges she used Washington
11 Healthcare’s website and patient portal “to search for information about her medical conditions,
12 look for doctors, make appointments, review prescription information, and communicate with her
13 health care providers.” *Id.* ¶ 39.

14 9. Plaintiff Jan Doe alleges she is a patient of Washington Healthcare and “has used
15 the Washington Healthcare Website to search for Washington Healthcare doctors and medical
16 treatment.” *Id.* ¶¶ 22-23, 44.

17 10. The Facebook Pixel is one of several “Business Tools” offered by Facebook¹ that
18 “help website owners and publishers, app developers, and business partners, including advertisers
19 and others, integrate with Facebook, understand and measure their products and services, and better
20 reach and serve people who might be interested in their products and services.” *Id.* ¶ 26 (internal
21 quotations and citation omitted).

22 11. Facebook’s Conversions Application Programming Interface (“CAPI”) measures ad
23 performance, “which helps website owners to better understand how digital advertising impacts
24 both online and offline results.” Compl. ¶ 63.

25 12. Plaintiffs allege that, the Facebook Pixel, allegedly used on Washington
26 Healthcare’s website, allegedly is a “snippet of code” that “tracks the people and type of actions
27 they take.” *Id.* ¶¶ 84, 198 (internal quotations and citation omitted).

28 ¹ Facebook rebranded itself as Meta in 2021.

13. Plaintiffs allege that, Facebook’s CAPI, allegedly used on Washington Healthcare’s website, allegedly “tracks the user’s website interaction.” *Id.* ¶ 62.

14. Plaintiffs do not assert that Washington Healthcare discloses names, social security numbers, diagnoses, birth dates, or comparable information to third parties.

BASIS FOR REMOVAL

15. Washington Healthcare removes this case pursuant to the federal officer removal statute. 28 U.S.C. § 1442(a). That statute permits removal when the defendant is “the United States or any agency thereof or any officer (or any person acting under that officer) of the United States or of any agency therefore, in an office or individual capacity, for or relating to any act under color of such office ...” *Id.* § 1442(a)(1).

16. The United States Supreme Court has directed that the federal officer removal statute is to be broadly construed, and that defendants may remove under this statute when they are acting under color of federal office. *Colorado v. Symes*, 286 U.S. 510, 517 (1932); *Arizona v. Manypenny*, 451 U.S. 232, 242 (1981). To do so, a defendant must show that (a) it is a “person” within the meaning of the statute; (b) there is a causal nexus between its actions, taken pursuant to a federal officer’s directions, and plaintiff’s claims; and (c) it can assert a “colorable federal defense.” *Riggs v. Airbus Helicopters, Inc.*, 939 F.3d 981, 986–87 (9th Cir. 2019) (quoting *Fidelitad, Inc. v. Insitu, Inc.*, 904 F.3d 1095, 1099 (9th Cir. 2018)).

17. Since at least 2004, the federal government – through executive order, legislation, and regulatory and sub-regulatory action – has directed and overseen a public-private initiative to develop a nationwide infrastructure for health information technology. It has incentivized and directed providers who participate in the Medicare and Medicaid programs (like Washington Healthcare) to offer patients online access to their medical records, and to optimize patient engagement with their medical information. The federal government has also modeled the behavior it wants to see; it has created a portal for Medicare beneficiaries and worked with the same third-party services, with the same “source code,” at issue in this case.

18. Washington Healthcare has dutifully assisted and followed the federal government’s direction in this effort. In so doing, it has acted within the penumbra of federal action and office.

1 Given this, and the Supreme Court’s directive that the federal officer removal statute must be
 2 broadly construed, and because this suit challenges this federally-directed conduct, the
 3 requirements of the federal removal statute are satisfied.

4 ***The Meaningful Use Program***

5 *President Bush Establishes the Position of National Health*

6 *Information Technology Coordinator*

7 19. In 2004, President George W. Bush issued an Executive Order that established a
 8 National Health Information Technology Coordinator (“National Coordinator”). *See* Exec. Order
 9 13335 (Apr. 27, 2004). The purpose of the Order was to spark a “nationwide implementation of
 10 interoperable health information technology in both the public and private health care sectors.” *Id.*

11 20. Through the Executive Order, President Bush further ordered the National
 12 Coordinator to “develop, maintain, and direct the implementation of a strategic plan to guide the
 13 nationwide implementation of interoperable health information technology in both the public and
 14 private health care sectors that will reduce medical errors, improve quality, and produce greater
 15 value for health care expenditures.” *Id.*

16 *The National Coordinator Makes Access to*

17 *Online Health Care Records a National Priority*

18 21. From the outset, one important piece of this federal health information technology
 19 mission was the ability for individuals to be able to access their health records online. *See TOMMY*
 20 *G. THOMPSON & DAVID J. BRAILER, MD, PHD, The Decade of Health Information Technology:*
 21 *Delivering Consumer-centric and Information-rich Health Care*, at pg. e (July 21, 2004).

22 22. But years later, when the percentage of Americans accessing their health
 23 information online remained low, the National Coordinator reported in 2015: “To truly empower
 24 consumers and move the health care system to become more patient-centered, *the government will*
 25 *need to help change these dynamics.*” *Id.* (emphasis added). *See also, e.g.,* Joan Neuner, MD, MPH,
 26 et al., *Meaningful Use and the Patient Portal: Patient enrollment, use and satisfaction with patient*
 27 *portals at a later-adopting center*, AM. J. MED. QUAL. (Mar. 2015), at pg. 1 (“only 28% of
 28

1 physicians reported having EHRs that allowed patient access to records. Despite this, the architects
2 of the MU rules have set the high bar for patient EHR access and communication.”).

3 Congress Uses Financial Incentives to Ensure that Health Care Providers

4 Make Their Health Care Records Available to Patients and Their Caretakers Online

5 23. In 2009, Congress codified the Office of the National Coordinator in the Health
6 Information Technology for Economic and Clinical Health Act of 2009. 123 Stat. 115, 247 (2009).²
7 At that time, Congress allocated billions of dollars to CMS to “invest in the infrastructure necessary
8 to allow for and promote the electronic exchange and use of health information for each individual
9 in the United States consistent with the goals outlined in the strategic plan developed by the
10 [National Coordinator].” *Id.*

11 24. As with President Bush’s Executive Order, Congress tasked the National
12 Coordinator with a series of responsibilities under federal law, including to “update the Federal
13 Health IT Strategic Plan (developed as of June 3, 2008) to include specific objectives, milestones,
14 and metrics” with respect to each of the following: “(i) [t]he electronic exchange and use of health
15 information and the enterprise integration of such information,” as well as “(vii) [s]trategies to
16 enhance the use of health information technology in improving the quality of health care.” 42
17 U.S.C. § 300jj-11(3)(A) (Strategic plan).

18 25. Congress further codified a series of incentive payments for the Department of
19 Health and Human Services, in conjunction with the Centers for Medicare and Medicaid Services,
20 to make to health care providers for their adoption of health information technology, including
21 through the Medicare program. *See* 42 U.S.C. § 1395w-4(o) (Incentives for adoption and
22 meaningful use of certified EHR technology); *see also* C. Stephen Redhead, *The Health*
23 *Information Technology for Economic and Clinical Health (HITECH) Act*, at pg. 2 (CONG. RES.
24 SERV. Apr. 27, 2009) (discussing various financial incentives).

25 26. As the Congressional Research Service explained at the time: “Beginning in 2011,
26 the legislation provides Medicare incentive payments to encourage doctors and hospitals to adopt
27

28 ² “There is established within the Department of Health and Human Services an Office of the
National Coordinator for Health Information Technology.” 42 U.S.C. § 300jj-11(a).

1 and use certified EHRs. Those incentive payments are phased out over time and replaced by
2 financial penalties for physicians and hospitals that are not using certified EHRs.” *Id.*

3 *The National Coordinator Makes Online Access to Health Information a*
4 *Key Component of the Meaningful Use Regulations*

5 27. The following year, the Department of Health and Human Services adopted the
6 Meaningful Use regulations. *See* DEPARTMENT OF HEALTH AND HUMAN SERVICES, CENTERS FOR
7 MEDICARE AND MEDICAID SERVICES, *Medicare and Medicaid Programs; Electronic Health Record*
8 *Incentive Program*, 75 Fed. Reg. 144, 44314 (Jul. 28, 2010). In introducing the final regulations,
9 the agencies stated as follows: “Certified EHR technology used in a meaningful way is one piece
10 of a broader HIT infrastructure needed to reform the health care system and improve health care
11 quality, efficiency, and patient safety.” *Id.* at 44321.

12 28. One central component of the meaningful use regulations was the ability for patients
13 to access their health care records online. *See* 42 C.F.R. § 495.20(f)(12)(i)(B) (“Beginning in 2014,
14 provide patients with the ability *to view online*, download, and transmit information about a hospital
15 admission.”) (emphasis added); *see also id.* at (ii)(B) (same); REBECCA MITCHELL COELIUS, *Get*
16 *the facts regarding view, download and transmit 2014 requirements*, HealthITbuzz, The Latest on
17 Health IT from the ONC, at pg. 1 (Jan. 31, 2014) (“All providers and hospitals attesting to
18 Meaningful Use in 2014 will need to implement the [view, download, and transmit] VDT
19 capabilities for their patients. Those in Stage 1 will attest for *access*, those in Stage 2 will attest for
20 *use*. The term ‘online access’ used in the VDT measure definitions refers to all three capabilities –
21 view, download and transmit.”) (emphasis in original).

22 29. The regulations required health care providers to attest to the National Coordinator
23 and to the Centers for Medicare and Medicaid Services on their progress with respect to this criteria
24 in particular. *See* 45 C.F.R. § 170.314(e)(1)(i) (requiring reporting on “Patient engagement” for
25 “[v]iew, download, and transmit to 3d party”; “EHR technology must provide patients (and their
26 authorized representatives) with an online means to view, download, and transmit to a 3d party the
27 data specified below,” including “[t]he Common [Meaningful Use] Data Set”); 45 C.F.R. § 170.102
28 (Definitions) (defining the term “Common [Meaningful Use] Data Set” to include “[s]moking

status,” “[m]edications,” “[m]edication allergies,” “[l]aboratory tests,” “[l]aboratory value(s)/result(s),” “[v]ital signs,” “[c]are plan field(s), including goals and instructions,” and “[p]rocedures”).

The National Coordinator Directs Healthcare Providers to Make Patient Portals

Available to Their Patients Online

30. To meet these criteria, the federal government directed health care providers to make online patient portals available to their patients: “You will have better success meeting meaningful use requirements for stage 2 if you integrate a patient portal effectively into your practice operations.” NAT’L LEARNING CONSORTIUM, *How to Optimize Patient Portals for Patient Engagement and Meet Meaningful Use Requirements* (May 2013).

31. The government told health care providers that they “should understand the elements of an effective portal program and apply them to the specific needs of your practice.” *Id.* Recommended governmental actions included “1. Learn the benefits of patient portals for patients and providers. 2. Understand how a patient portal helps achieve meaningful use requirements. 3. Implement proactive, engaging portal features. 4. Implement the portal with a systematic process. 5. *Actively promote and facilitate portal use.*” *Id.*

32. The National Coordinator subsequently issued a “Patient Engagement Playbook,” which was described as “a tool for clinicians, health care practice staff, hospital administrators, and others who want to leverage health IT – particularly electronic health records (EHR) patient portals – to engage patients in their health and care.” THE OFFICE OF THE NAT’L COORDINATOR FOR HEALTH INFORMATION TECHNOLOGY, *Patient Engagement Playbook* (last updated Apr. 17, 2019).

33. The National Coordinator has also specified how providers can optimize such portals, explaining that they “must be engaging and user-friendly”; “how a patient portal helps achieve meaningful use requirements”; and how a provider can “actively promote and facilitate portal use.” THE OFFICE OF THE NAT’L COORDINATOR FOR HEALTH INFORMATION TECHNOLOGY, *How to Optimize Patient Portals for Patient Engagement and Meet Meaningful Use Requirements* (2013), available at

https://www.healthit.gov/sites/default/files/nlc_how_to_optimizepatientportals_for_patientengage

1 [ment.pdf](#).

2 34. The National Coordinator has also published guidance for private providers to
 3 follow, including through five-year strategic plans. In the 2015-2020 plan, it dictated that “federal
 4 agencies” were to “collaborate with . . . private stakeholders to . . . build a culture of electronic
 5 health information access and use.” THE OFFICE OF THE NAT’L COORDINATOR FOR HEALTH
 6 INFORMATION TECHNOLOGY, *Federal Health Information Technology Strategic Plan 2015-2020*,
 7 available at https://www.healthit.gov/sites/default/files/9-5-federalhealthitstratplanfinal_0.pdf
 8 (emphasis added). And, in the 2020-2025 plan, it noted that this has already happened, saying:
 9 “Federal, state, and local governments, along with the private sector, have worked together to
 10 help digitize health information and healthcare.” THE OFFICE OF THE NAT’L COORDINATOR FOR
 11 HEALTH INFORMATION TECHNOLOGY, *Federal Health Information Technology Strategic Plan*
 12 *2020-2025* available at [https://www.healthit.gov/sites/default/files/page/2020-](https://www.healthit.gov/sites/default/files/page/2020-10/Federal%20Health%20IT%20Strategic%20Plan_2020_2025.pdf)
 13 [10/Federal%20Health%20IT%20Strategic%20Plan_2020_2025.pdf](https://www.healthit.gov/sites/default/files/page/2020-10/Federal%20Health%20IT%20Strategic%20Plan_2020_2025.pdf) (“2020-2025 Strategic
 14 Plan”).

15 35. In addition to this guidance, CMS has created its own portal, offering a model for
 16 private providers to follow. To optimize individual engagement with the portal, CMS relies on
 17 third-party marketers, like Google and Facebook. By working with over two dozen third-party
 18 servicers, CMS is able to provide users with the information most relevant to them. *See generally*
 19 Medicare.gov, Privacy Policy (explaining that website “users’ activity on third-party websites that
 20 Medicare.gov links to (like Facebook or Twitter) is governed by the security and privacy policies
 21 of those websites,” and that any information users “provide to register on Facebook is voluntarily
 22 contributed and isn’t maintained by” CMS).

23 *Washington Healthcare Makes a Patient Portal and Electronic Health Information Exchange*
 24 *Available Online to Washington Healthcare Patients in*
 25 *Direct Furtherance of this Federal Mission*

26 36. The Washington Healthcare patient portal and electronic Health Information
 27 Exchange (“HIE”) are tools leveraged and promoted by Washington Healthcare for its patients’ use
 28 as a direct result of the federal initiative to make health care records available to patients online.

1 Since leveraging the patient portal and electronic HIE, Washington Healthcare has met the
 2 Meaningful Use criteria, and has thus received incentive payments from the federal government. If
 3 necessary, Washington Healthcare is prepared to submit a declaration supporting its participation
 4 in the Meaningful Use program.

5 ***Washington Healthcare Is a “Person”***

6 37. By the plain terms of the statute, removal is permitted by “any person acting under
 7 that officer.” 42 U.S.C. § 1442(a)(1).

8 38. While the statute is silent as to the definition of a “person,” organizations, corporate
 9 defendants, and government entities have routinely removed under this provision and been deemed
 10 a “person” under the statute. *See, e.g., Arness v. Boeing N. Am., Inc.*, 997 F. Supp. 1268, 1272 (C.D.
 11 Cal. 1998); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572 (N.D. Cal. 1992); *Overly v. Raybestos-*
 12 *Manhattan*, No. C-96-2853-SI, 1996 U.S. Dist. LEXIS 13535, at *7 (N.D. Cal. Sept. 6, 1996);
 13 *Malek v. Blackmer Pump Co.*, No. CV 15-04454 SJO (JEMx), 2015 U.S. Dist. LEXIS 97755, at *5
 14 (C.D. Cal. July 24, 2015).

15 39. WHHF is a California nonprofit corporation and the District is a local Health Care
 16 District that is considered a governmental agency. Therefore, since the federal officer statute is to
 17 be broadly construed, WHHF and the District both qualify as a person under that statute.

18 ***There Is a Causal Nexus Between Washington Healthcare’s Actions and Plaintiffs’ Claims***

19 40. To demonstrate a causal nexus, the private person must show: (1) that the person
 20 was “acting under” a federal officer in performing some “act under color of federal office,” and (2)
 21 that such action is causally connected with the plaintiff’s claims against it. *See Goncalves ex rel.*
 22 *Goncalves v. Rady Child.’s Hosp. San Diego*, 865 F.3d 1237, 1244–50 (9th Cir. 2017). The federal
 23 officer removal statute should be “liberally construed” to fulfill its purpose of allowing federal
 24 officials and agents who are being prosecuted in state court for acts taken in their federal authority
 25 to remove the case to federal court. *Watson v. Philip Morris Cos.*, 551 U.S. 142, 147–49, 127 S.Ct.
 26 2301, 168 L.Ed.2d 42 (2007).

Washington Healthcare Is Acting Under a Federal Officer

41. This element focuses on the relationship between the federal government and the private entity. It asks whether the entity is engaged in “an effort to assist, or to help carry out, the duties or tasks of the federal superior,” and whether the relationship between the government and private entity involves “detailed regulation, monitoring, or supervision.” *Goncalves*, 865 F.3d at 1245 (citing to *Watson*, 551 U.S. at 152).

42. Here these fundamental and liberally-construed requirements are easily met. The federal government is incentivizing, regulating, monitoring, and supervising Washington Healthcare’s actions in the Meaningful Use program in order to meet the federal government’s national priority of interoperable health information technology.

43. First, Washington Healthcare (along with numerous other health care entities) is helping the government produce the nationwide, interoperable information technology infrastructure for health information. Notably, the federal government itself has repeatedly acknowledged the private sector’s essential role in the project, most recently stating that the federal government, “along with the private sector, have worked together to help digitize health information and healthcare.” *See* 2020-2025 Strategic Plan.

44. Second, in the absence of Washington Healthcare’s actions (and the work of comparable medical providers throughout the country), the federal government would be left alone to complete its mission. As its efforts to digitize information and increase patient engagement with Medicare beneficiaries underscore, it would likely attempt to do exactly that.

45. Third, the government has specified how to best enhance patient engagement, including through a patient portal. It has clarified how to generally design the portals, and has told entities how best to market their on-line resources. Furthermore, through its own engagement with third-party services, it has modeled the behavior that private entities are to follow.

46. Finally, the government has created an office dedicated to this issue and has closely monitored the work of private entities (like Washington Healthcare). It has also supervised the general development of this information technology infrastructure. And, because Meaningful Use incentives have been available only to entities participating in the Medicare and Medicaid

1 programs, CMS substantially incentivizes Washington Healthcare and comparable organizations to
2 not only maintain public websites and/or patient portals, but also to achieve meaningful use of
3 them.

4 47. In like circumstances, courts have liberally construed the “acting under”
5 requirement, holding that defendant medical providers were “acting under” a federal officer while
6 performing similar alleged conduct. *UPMC*, 2020 WL 4381675, at *6 (holding that the University
7 of Pittsburgh Medical Center’s participation in the Meaningful Use Program was sufficient to
8 satisfy the “acting under” requirement necessary for the federal officer removal statute); *see also*
9 *Doe v. ProMedica Health Sys., Inc.*, No. 3:20 CV 1581, 2020 WL 7705627, at **2-3 (N.D. Ohio
10 Oct. 30, 2020) (same; “[b]ecause [ProMedica Health System’s] participation assisted the federal
11 government in achieving [the creation of a unified system of patient electronic health records],
12 Defendant has satisfied the ‘acting under’ prong”).

13 48. In *UPMC*, as in this case, plaintiffs sought redress under state law for UPMC’s
14 alleged disclosure of Plaintiff’s personally identifiable information to third parties for internet
15 marketing purposes without their knowledge or authorization. *UPMC*, 2020 WL 4381675, at *1.
16 The *UPMC* court focused on both the portal and the public website as being ways of furthering the
17 government’s goal of increasing patient engagement with electronic health records. *See, e.g., id.* at
18 *6 (“UPMC, as a participant in the Meaningful Use Program, receives incentive payments from
19 DHHS for its development and use of the UPMC website and the MyUPMC portal in accordance
20 with the program’s criteria.”). The *UPMC* court also emphasized that “it is not necessary that the
21 complained-of conduct be done at the specific behest of the federal superior,” and “any dispute
22 about whether the allegedly wrongful conduct was outside the scope the private entity’s duties is
23 the very thing that should be left to a federal court to decide.” *Id.* at *7. A private entity “need only
24 show that the allegations in the complaint are directed at the private entity’s efforts to assist a federal
25 superior.” *Id.* at *9–10. That low bar is clearly met here. Here, as in *UPMC*, “[t]here is plainly a
26 connection or association between [the medical provider’s alleged] website management and
27 marketing strategies and the Meaningful Use program, particularly the incentives that are tied to
28

1 patient participation and usability. Plaintiffs’ claims are therefore ‘for or relating to’ an act under
2 color of federal office.” *Id.*

3 ***Plaintiffs’ Claims Relate to the Actions Under Color of Federal Office***

4 49. Under Section 1442(a)(1), the conduct at issue in the case must also “have been
5 undertaken for or relating to” the federal office. As the *UPMC* decision shows, this requirement is
6 liberally construed and easily met here. *UPMC*, 2020 WL 4381675, at *12 (“There is plainly a
7 connection or association between UPMC’s website management and marketing strategies and the
8 Meaningful Use program, particularly the incentives that are tied to patient participation and
9 usability.”).

10 50. Plaintiffs’ Complaint directly challenges Washington Healthcare’s website
11 analytics practices, which promote “meaningful use” by helping to drive patients to the Washington
12 Healthcare website and to the patient portal.

13 51. Plaintiffs’ Complaint also generally targets Washington Healthcare’s alleged
14 tracking of online behaviors through source code and cookies, along with the use of marketing
15 companies in conjunction with its public medical website. The Meaningful Use program envisions
16 these activities, as manifested by the federal government’s own use of these codes and third parties
17 for its Medicare website.

18 52. Indeed, as Plaintiffs themselves allege, the entire point of using the third-party
19 services is to direct traffic to, and increase engagement with, Washington Healthcare’s website. For
20 example, they allege that Facebook Pixel is a “snippet of code” that “tracks the people and type of
21 actions they take.” Compl. ¶¶ 84, 198 (internal quotations and citation omitted). Further, Plaintiffs
22 allege “CAPI tracks the user’s website interaction.” *Id.* ¶ 62.

23 ***Washington Healthcare Raises Colorable Federal Defenses to Plaintiffs’ Claims***

24 53. The final requirement for removal under this statute erects a low bar and merely
25 requires that the defendant’s assertion is both “defensive” and “based in federal law.” *Mesa v. Cal.*,
26 489 U.S. 121, 129-30 (1989); *see also Bahrs v. Hughes Aircraft Co.*, 795 F. Supp. 965, 969 (D.
27 Ariz. 1992) (“The question is not whether a defendant’s claimed defense is meritorious, but only
28 whether a colorable claim to such a defense has been made.”).

1 54. Defendants intend to assert several defenses, but by way of illustration and not
2 limitation, there is at least one colorable federal defense to the claims at issue here that satisfy this
3 requirement.

4 55. In response to Plaintiffs' repeated claims that "protected health information" was
5 disclosed, Washington Healthcare will argue that the information purportedly disclosed (*i.e.*, IP
6 addresses and other web metadata) is outside of the purview of protected health information as
7 defined by the Health Insurance Portability and Accountability Act of 1996 (HIPAA). This is a
8 duty-based defense that Washington Healthcare had no duty under HIPAA. "In the federal officer
9 removal context, a duty-based defense must be one that is based on a federal duty to act, or the lack
10 of such a duty, such as denying alleged violations of a federal duty." *UPMC*, 2020 WL 4381675 at
11 *6 (citations and quotations omitted). The Northern District of California has already held in an
12 analogous case against numerous health care providers challenging alleged disclosures on the
13 Internet through routine website traffic that the information allegedly transmitted is not protected
14 under HIPAA. *See Smith v. Facebook*, 262 F. Supp. 3d 943, 954-55 (N.D. Cal. 2017). This defense
15 turns on an interpretation of federal law and on its own is sufficient to satisfy this element's low
16 bar.

17 56. Second, Washington Healthcare will argue that federal preemption applies here. "A
18 defense based on federal preemption of state law is also sufficient to raise a colorable federal
19 defense for the purposes of the federal officer removal statute." *UPMC*, 2020 WL 4381675 at *7.
20 In *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 343 (2001), the Supreme Court held that
21 plaintiffs' state law fraud on the Food and Drug Administration claims brought against the
22 defendant inevitably conflicted with the FDA's responsibility to police fraud consistently with the
23 Agency's judgment and objections. The Supreme Court held that federal preemption is warranted
24 where "the relationship between a federal agency and the entity it regulates is inherently federal in
25 character." *Id.* at 347. As the *UPMC* court recognized under similar circumstances, "the
26 relationship between [a health care provider] and DHHS is 'inherently federal' in nature, such that
27 the issue of whether [Plaintiff's] state-law claims are preempted under the principles articulated in
28 *Buckman* should be decided by a federal court." *UPMC*, 2020 WL 4381675 at *7.

1 57. Because each of the requirements of the statute are satisfied, removal to this Court
2 is proper.

3 **PROCEDURAL REQUIREMENTS FOR REMOVAL**

4 58. Washington Healthcare satisfies all of the procedural requirements under 28 U.S.C.
5 § 1446.

6 59. Washington Healthcare is filing this Notice of Removal within thirty (30) days of
7 its receipt of the Complaint by “service.” 28 U.S.C. § 1446.

8 60. Washington Healthcare files this Notice in the United States District Court of the
9 Northern District of California, because the State court in which the action is pending, the Superior
10 Court of Alameda County, is within this federal judicial district. This Notice is signed pursuant to
11 Federal Rules of Civil Procedure, Rule 11.

12 61. Washington Healthcare has attached hereto as **Exhibit “A”** is a true and correct
13 copy of “all process, pleadings, orders, and other documents,” currently on file in the state court,
14 including Plaintiffs’ Complaint.

15 62. Upon filing this notice, Washington Healthcare will promptly “give written notice
16 thereof to all adverse parties,” and will “file a copy of the notice with the clerk” of the State court.

17 63. Pursuant to Federal Rule of Civil Procedure 7.1, Washington Healthcare is filing a
18 Corporate Disclosure Statement concurrently with this Notice of Removal.

19 **CONCLUSION**

20 61. As set forth above, Plaintiffs’ Complaint directly challenges practices and
21 procedures Washington Healthcare has taken acting under color of federal law in implementing
22 federal policy to nationalize the health information technology infrastructure. Plaintiffs’ Complaint
23 is therefore appropriately removable to this Court pursuant to 28 U.S.C. § 1442(a)(1).
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1 Dated: September 29, 2023

BAKER & HOSTETLER LLP

2
3 By: /s/ Teresa C. Chow

TERESA C. CHOW

4 *Attorneys for Defendants*

WASHINGTON TOWNSHIP HEALTH CARE

DISTRICT; WASHINGTON HOSPITAL

HEALTHCARE SYSTEM (a wrongly named party);

WASHINGTON HOSPITAL (a wrongly named

party); WASHINGTON HOSPITAL

HEALTHCARE FOUNDATION

BAKER & HOSTETLER LLP
ATTORNEYS AT LAW
LOS ANGELES

PROOF OF SERVICE

I, Roxana Guevara, declare:

I am employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 11601 Wilshire Boulevard, Suite 1400, Los Angeles, CA 90025-0509. On September 29, 2023, I served a copy of the within document(s):

DEFENDANTS' NOTICE OF REMOVAL

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California addressed as set forth below.



by transmitting via electronic mail the document(s) listed above to the e-mail address(es) set forth below on this date and the transmission was reported as complete and without error.

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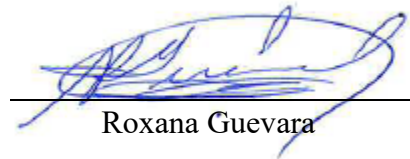
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14 I am readily familiar with the firm's practice of collection and processing correspondence
15 for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same
16 day with postage thereon fully prepaid in the ordinary course of business. I am aware that on
17 motion of the party served, service is presumed invalid if postal cancellation date or postage meter
18 date is more than one day after date of deposit for mailing in affidavit.

19 I declare under penalty of perjury under the laws of the United States of America that the
20 above is true and correct.

21 Executed on September 29, 2023, at Los Angeles, California.

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Roxana Guevara